Supreme Court, U.S.
FILED
AUG 7 2000
CLERK

(4)

No. 00-39

IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioner,

v.

CARDTOONS, L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

BRUCE P. KELLER
Counsel of Record
AYALA DEUTSCH
Attorneys for the International Trademark Association
1133 Avenue of the Americas
New York, New York 10036
(212) 768-9887

161401

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

2000

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Introduction	1
Statement of Interest of the *Amicus Curiae*	3
Argument	5
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) 5

Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9th Cir. 1982) 3

Avent America, Inc. v. Playtex Prods., Inc., 68 F. Supp. 2d 920 (N.D. Ill. 1999) 9

Boustany v. Boston Dental Group, Inc., 42 F. Supp. 2d 100 (D. Mass. 1999) 9

Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Comm'n, 448 F. Supp. 1237 (D. Nev. 1978), *aff'd*, 440 U.S. 941 (1979) 4

Citibank, N.A. v. Citytrust, 756 F.2d 273 (2d Cir. 1985) 8

Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556 (Fed. Cir. 1994) 3

Dickinson v. Zurko, 527 U.S. 150 (1999) 3

Federal Express Corp. v. Federal Espresso, Inc., 201 F.3d 168 (2d Cir. 2000) 6

Cited Authorities

	Page
Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank and United States, 527 U.S. 627 (1999)	3, 6
In re Borden, Inc., 92 F.T.C. 669 (1978), *aff'd sub nom Borden, Inc. v. Fed. Trade Comm'n*, 674 F.2d 498 (6th Cir. 1982), *vacated and remanded*, 461 U.S. 940 (1983)	3, 4
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)	3
Les Ballets Trockadero de Monte Carlo, Inc. v. Trevino, 945 F. Supp. 563 (S.D.N.Y. 1996)	9
Lucent Info. Management, Inc. v. Lucent Technologies, Inc., 186 F.3d 311 (3d Cir. 1999)	6
NAACP v. Button, 371 U.S. 415 (1963)	11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	11
Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789 (8th Cir. 1996)	3
Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390 (E.D. La. 1992)	5

Cited Authorities

	Page
Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995)	3
Ralston Purina Co. v. On-Cor Frozen Foods, Inc., 746 F.2d 801 (Fed. Cir. 1984)	3
Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999)	6
Redd v. Shell Oil Co., 524 F.2d 1054 (10th Cir. 1975)	4
Shuttlesworth v. City of Birmingham, 394 U.S. 147	11
Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)	3
Wal-Mart Stores v. Samara Bros., 120 S. Ct. 1339 (2000)	3, 6
WarnerVision Entertainment Inc. v. Empire of Carolina, Inc., 101 F.3d 259 (2d Cir. 1996)	3
Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658 (5th Cir. 2000)	6
Whisenhunt v. Spradlin, 464 U.S. 965 (1983)	11
White v. Samsung Elecs. Am., Inc., 971 F.2d 139 (9th Cir. 1992)	5

Cited Authorities

Page

Statutes:

15 U.S.C. § 1125(a) 5

Anticybersquatting Consumer Protection Act of 1999, Pub. L. No. 106-1131, 113 Stat. 1501 (1999) 4, 12

Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1995) 4, 11

Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988) 4, 10, 11

United States Constitution:

First Amendment 2, 11

Other Authorities:

Ronald B. Coolley, *Notifications of Infringement and Their Consequences*, 77 J. Pat. & Trademark Off. Soc'y 246 (1995) 6, 8

H.R. Rep. No. 104-879, 104th Cong., 2d Sess. (1997) 4

H.R. Rep. No. 104-374, 104th Cong., 1st Sess. (1995), *reprinted in* 1996 U.S.C.C.A.N. 1029 .. 12

134 Cong. Rec. S16974 (daily ed. Oct. 20, 1988) ... 4

Cited Authorities

Page

Pokotilow & Siegal, *Cease and Desist Letters: The Legal Pitfalls for Patentees*, Intellectual Property Strategist 1 (Dec. 1997) 6, 7

S. Rep. No. 100-515, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577 ..... 10, 12

S. Rep. No. 106-140, 106th Cong., 1st Sess. (1999) 4, 6, 12

S. Rep. No. 333, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274 10

INTRODUCTION

The International Trademark Association ("INTA") submits this brief as *amicus curiae* in support of a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit to review its *en banc* decision in *Cardtoons, L.C. v. Major League Baseball Players*, 2000 WL 358414, No. 98-5061 (10th Cir., April 7, 2000). Both parties have consented to this filing.[1]

INTA urges that *certiorari* be granted and that this Court resolve the uncertainty created by the *Cardtoons* decision because it has had an immediate and broad impact on trademark owners.

Owners of trademarks and of other intellectual property rights traditionally have protected their valuable rights by sending cease-and-desist letters to alleged violators as a preliminary step, before having to resort to litigation. In many instances, such letters suggest, and result in, an amicable resolution of the matter. In others, they lead to the discovery of the ultimate source of the alleged infringment, which initially may not be apparent, and thus enable the intellectual property owner to take action against the appropriate party.

The decision below creates great uncertainty concerning the possible consequences of sending such letters prior to the commencement of litigation. The Tenth Circuit held that this common pre-litigation strategy exposes trademark

---

1. Consent letters from both parties are being filed with the Clerk contemporaneously with this brief. This amicus curiae brief was funded solely by the INTA and authored entirely by counsel for the INTA.

owners to the risk of retaliatory lawsuits based on a series of claims including, but not limited to, tortious interference with contract, negligence, *prima facie* tort, and libel. The holding thus excludes cease-and-desist letters from the immunities ordinarily granted to right-holders who assert well-founded claims under this Court's *Noerr-Pennington* doctrine and the First Amendment right to petition. It rests on two untenable distinctions: (i) between activities that are incidental to litigation, such as cease-and-desist letters, as opposed to the actual commencement of a lawsuit; and (ii) between immunity from retaliatory lawsuits alleging antitrust claims and lawsuits that raise other, sometimes closely related, substantive claims.

INTA urges the Court to grant *certiorari*. The Tenth Circuit's decision will have a chilling impact on trademark owners and ultimately may harm consumers because it threatens important pre-litigation trademark protection practices and ignores the beneficial purposes served by such measures. It effectively requires trademark owners to shoot first and ask questions later. This approach benefits nobody: not the trademark owner, not the alleged infringer, not the courts, and not the public. Further, the holding is inconsistent with precedent protecting the reasonable, good faith pre-litigation assertion of substantive rights from legal liability, and with congressional recognition of the heightened need for stronger laws protecting trademarks and other forms of intellectual property.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

INTA is a not-for-profit organization whose more than 3,800 members have a special interest in trademarks. INTA's membership includes trademark owners, law firms, advertising agencies, package design firms and professional associations from the United States and 119 other countries. All share the goals of emphasizing the importance of trademarks and trademark protection, and of promoting an understanding of the essential role trademarks play in fostering informed decisions by consumers, effective commerce, and fair competition. INTA members frequently are participants in trademark litigation, and therefore are interested in the development of clear and consistent principles of trademark and unfair competition law. INTA has substantial expertise in trademark law and has selectively participated as an *amicus curiae* in cases involving vital trademark issues.[2]

---

2. Cases in which INTA has filed *amicus* briefs include: *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 120 S. Ct. 1339 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank.*, 527 U.S. 627 (1999); *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *WarnerVision Entertainment Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259 (2d Cir. 1996); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789 (8th Cir. 1996); *Conopco, Inc. v. May Dep't Stores Co.*, 46 F.3d 1556 (Fed. Cir. 1994); *Ralston Purina Co. v. On-Cor Frozen Foods, Inc.*, 746 F.2d 801 (Fed. Cir. 1984); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316 (9th Cir. 1982); *In re Borden, Inc.*, 92 F.T.C. 669 (1978), *aff'd sub nom Borden, Inc. v. Fed. Trade Comm'n*, 674 F.2d 498 (6th Cir. 1982), *vacated*

(Cont'd)

INTA was founded in 1878 as the "United States Trademark Association," in part to encourage the enactment of federal trademark legislation after this country's first trademark act was declared unconstitutional. Since that time, INTA has been instrumental in making recommendations and providing assistance to legislators in connection with each subsequent trademark act, or amendment thereof, including the Trademark Law Revision Act of 1988, *see, e.g.*, 134 Cong. Rec. S16974 (daily ed. Oct. 20, 1988) (statement of Sen. DeConcini), the Federal Trademark Antidilution Act of 1995, *see, e.g.*, H.R. Rep. No. 104-879, 104th Cong., 2d Sess. (1997) (noting use of testimony from INTA's executive vice president), and the recent Anticybersquatting Consumer Protection Act of 1999, *see, e.g.*, S. Rep. No. 106-140, 106th Cong., 1st Sess. (1999) (relying on statements by INTA's president, made before the Senate Committee on the Judiciary).

INTA has a particular interest in this case because a grant of *certiorari* will enable the Court to address the important issues raised in the case and give trademark owners the clear guidance necessary for them to manage their enforcement efforts. The decision in *Cardtoons* undermines this clarity, and presents trademark owners with a harsh dilemma: remaining silent in the face of the infringement of their rights or being forced to commence a costly litigation without the ability to first protest with the aim of reaching an amicable resolution.

(Cont'd)

and remanded, 461 U.S. 940 (1983); *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975); *Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Comm'n*, 448 F. Supp. 1237 (D. Nev. 1978), *aff'd*, 440 U.S. 941 (1979).

ARGUMENT

The Tenth Circuit's holding in *Cardtoons* has grave consequences for trademark owners and ultimately for the consuming public. The Tenth Circuit held that a cease-and-desist letter asserting federal and other rights exposes intellectual property owners to a broad range of retaliatory claims. By so doing, the Tenth Circuit has cast serious doubt on traditional practices that trademark owners, asserting trademark and associated rights under the Lanham Act,[3] had relied upon as being immunized.

The Tenth Circuit's holding would strictly limit immunity in the litigation context to actions filed directly with a court. *See Cardtoons*, 2000 WL 358414, at *7 (holding that "a letter from a private party to a private party simply does not implicate the right to petition, regardless of what the letter threatens"). The uncertainties the decision creates thus extend well beyond cease-and-desist letters, to all attempts to engage in private resolution of trademark and other intellectual property disputes in lieu of litigation. If left standing, the impact of the *Cardtoons* decision will be to dissuade trademark owners from employing many of the best and most efficient mechanisms for ensuring that their rights are respected, resulting in

---

3. In *Cardtoons*, MLBPA asserted that the defendant Cardtoons had violated the rights of publicity of MLBPA's union members under state law. Rights of publicity are, however, also protected under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and can be enforced under this section as claims for false endorsement. *See, e.g., White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985); *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992).

increased litigation and increased costs, both financial and otherwise, a result condemned by Congress. *See, e.g.*, S. Rep. No. 106-140, 106th Cong., 1st Sess., at 7 (1999) ("[U]ncertainty as to trademark law's application . . . has produced inconsistent judicial decisions and created extensive monitoring obligations, unnecessary legal costs, and uncertainty for consumers and trademark owners alike.")

The practical impact of the Tenth Circuit's decision on customary trademark enforcement steps cannot be overstated. The dissenters in *Cardtoons* were quite right to note that "[c]ease-and-desist letters are frequently used by businesses and individuals to protect their intellectual property rights." 2000 WL 358414, at *13 (Lucero, J., dissenting) (citing Ronald B. Coolley, *Notifications of Infringement and Their Consequences*, 77 J. Pat. & Trademark Off. Soc'y 246, 246 (1995) (describing notification to suspected intellectual property infringers as a "common reaction" of rights holders)). A recent search of the trademark library in LEXIS discloses countless reported cases involving pre-litigation letters. *See, e.g.*, *Wal-Mart Stores v. Samara Bros.*, 120 S. Ct. 1339, 1342 (2000); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658 (5th Cir. 2000); *Federal Express Corp. v. Federal Espresso, Inc.*, 201 F.3d 168, 171 (2d Cir. 2000); *Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1074 (9th Cir. 1999); *Lucent Info. Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 314 (3d Cir. 1999); *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank and United States*, 527 U.S. 627, 654 n.5 (1999) (Stevens, J., dissenting) (noting that "[t]he first step in enforcing a patent is usually to send a cease-and-desist or charge of infringement letter" (quoting Pokotilow & Siegal, *Cease and*

Desist Letters: The Legal Pitfalls for Patentees, Intellectual Property Strategist 1 (Dec. 1997)). The number of lawsuits actually filed, however, represents but a small fraction of the overall trademark enforcement effort in which businesses engage.

Furthermore, in the vast majority of cases, the use of pre-litigation cease-and-desist letters facilitates settlement out of court. Many trademark violators are unaware of their violations or are willing to stop their infringing conduct once they receive notice of the problem in the form of a private communication from the trademark owner. In other cases, such letters help establish either facts about the alleged infringer's activities that resolve the matter for the trademark owner with only minor or no changes in use by the alleged infringer, or defenses that the alleged infringer may have, resulting in amicable resolution. In still other cases, use of a cease-and-desist letter enables the trademark owner to identify the ultimate sources of offending merchandise, and thus avoid litigation against parties whose role is merely tangential. In short, early notice of an infringement to a trademark violator by means of a cease-and-desist letter, before a significant investment of time and resources into such infringing activity has been made, facilitates settlement and the discontinuance of such infringing activity in a great majority of cases. A simple cease-and-desist letter often effectively ends the dispute between the parties, without the need to flood the federal district courts with complaints about every act of possible infringement.

Moreover, a trademark owner generally cannot sue for infringement unless the infringing activity has already commenced or is truly imminent. For example, the filing of an "intent-to-use" application in the U.S. Patent and

Trademark Office for a potentially infringing mark, in and of itself, is unlikely to be a sufficient grounds for suit. Accordingly, many trademark owners send a warning letter or letter of inquiry when such an "intent-to-use" application is filed in order to resolve any conflict early before the applicant becomes heavily invested in the mark in question. If trademark owners are required to wait until use has commenced or is about to commence, and then file suit rather than send a letter, resolution of many disputes would become more difficult and costly. The alleged infringer surely would have preferred to hear the plaintiff's concerns long before the launch of a product or service bearing the offending mark, so that these concerns could be addressed or rebutted in amicable negotiations, rather than in a court proceeding that may potentially enjoin shipment of a product and threaten the company's business or even its existence.

Pre-litigation cease-and-desist letters also play a critical role in helping trademark owners to establish the kind of vigilance necessary to obtain preliminary injunctive relief. As the dissent in *Cardtoons* recognized, "such letters are often the first formal step in the process of enforcing the law of intellectual property . . . [and] frequently [are] . . . followed by the filing of a complaint with a court . . . for injunctive relief." 2000 WL 358414, at *14 (Lucero, J., dissenting) (citing Coolley, *Notifications of Infringement and Their Consequences*, at 246). Unless requests for such relief are sought quickly, trademark owners risk undercutting the presumption of irreparable harm that normally flows from infringing conduct and is necessary for the issuance of a preliminary injunction. *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). It has been held that the sending of a timely cease-and-desist letter, followed by a period of good faith settlement negotiations, will, by contrast, allow

trademark owners to preserve this presumption of harm. *See, e.g., Avent America, Inc. v. Playtex Prods., Inc.*, 68 F. Supp. 2d 920, 933 (N.D. Ill. 1999) (rejecting claim that delay in filing complaint rebutted presumption of irreparable injury because earlier cease-and-desist letter constituted timely and vigilant enforcement attempt); *Boustany v. Boston Dental Group, Inc.*, 42 F. Supp. 2d 100, 112 (D. Mass 1999) (same); *Les Ballets Trockadero de Monte Carlo, Inc. v. Trevino*, 945 F. Supp. 563, 574 (S.D.N.Y. 1996) (same). If the Tenth Circuit's decision dissuades trademark owners from sending cease-and-desist letters, the result is likely to be an increase in requests for immediate injunctive relief, further burdening the federal judiciary.

Use of pre-litigation practices also should be encouraged because many trademark owners are individuals or small businesses for whom the filing of a complaint can be a very costly and daunting prospect. This is especially so when it is unclear whether there is even a dispute with the other party, whether there is a need for additional information or clarification, or whether the other party has or can articulate a reasonable defense. Were the filing of a complaint the only way for trademark owners to begin enforcing their rights, airing their disputes, and determining their adversaries' positions, this alone might suffice to dissuade smaller trademark owners from making some well-founded assertions. Indeed, even larger companies cannot pursue every potential violation of their trademark rights in court. Thus, businesses large and small may be discouraged from enforcing their trademark rights in some instances if *Cardtoons* forces them to choose between commencing a potentially costly litigation and doing nothing.

For all of these reasons, it is clear that the failure to promptly send pre-litigation cease-and-desist letters will perpetuate consumer confusion in the marketplace. That plainly is not in the public interest. To the contrary, the effective and efficient enforcement of trademark rights prevents customer confusion while fostering increased product quality, effective commerce, and fair competition. Congress explained this point well in 1946 in connection with passage of the Lanham Act, noting that trademarks

> are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. [They] encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect [such symbols], therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.

S. Rep. No. 333, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275. More than forty years later, when Congress passed the Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988), Congress again acknowledged the consumer benefits of strong trademark laws. *See* S. Rep. No. 100-515, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5580 ("Trademark protection is important to both consumers and producers.") ("Trademarks encourage competition, promote economic growth and can raise the standard of living of an entire nation.").

If — as INTA believes — the Tenth Circuit's holding is in error, the holding thus improperly handicaps the rights of trademark owners to the detriment of the parties, the courts and the consuming public. The uncertainties created by the decision also may threaten important First Amendment values and provide a further and independent reason for the Court to add clarity to this area of the law. *Cf., e.g., Whisenhunt v. Spradlin,* 464 U.S. 965 (1983) (noting that the Court has "demand[ed] greater precision in laws . . . which may abridge First Amendment right"); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (holding that uncertainties in executive practice are grounds for withdrawing discretion that would otherwise chill First Amendment rights). As this Court has often noted, First Amendment rights such as these require not just protection, but "breathing space" to survive. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Finally, the Tenth Circuit's decision is inconsistent with the spirit and intent of recent federal legislation protecting the rights of intellectual property owners. By compelling trademark owners to file suit every time they learn of a situation that may violate their rights, the Tenth Circuit effectively has diminished the value of trademarks in an era in which Congress repeatedly has recognized that intellectual property rights are under siege and should be strengthened. On several occasions in the last twelve years, Congress has enacted litigation to increase the scope of protection for trademarks. These enactments include the Trademark Law Revision Act of 1988 ("TLRA"), Pub. L. No. 100-667, 102 Stat. 3935 (1988), the Federal Trademark Dilution Act of 1995 ("FTDA"), Pub. L. No. 104-98, 109 Stat. 985 (1995), and the recent Anticybersquatting Consumer Protection Act

of 1999 ("ACPA"), Pub. L. No. 106-1131, 113 Stat. 1501 (1999). Indeed, before the recent passage of the ACPA, many violators of trademarks refused to acknowledge that trademark rights even existed in cyberspace, and trademark rights were being violated *en masse*. *See, e.g.*, S. Rep. No. 106-140, 106th Cong., 1st Sess., at 7 (1999) (report on ACPA) ("Trademark owners are battling thousands of cases of cybersquatting each year."). In passing each of these acts, Congress found that trademark rights are not being sufficiently honored and that further legal protection for these rights and further clarity concerning their scope is therefore warranted. *See, e.g.*, *id.* S. Rep. No. 100-515, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5580 (report on the TRLA) ("[The Lanham Act] is now in need of updating and fine-tuning to reflect changes in other laws and business practices. . . .") ("[The TRLA] improves protection of those symbols that are among the Nation's most valuable assets."); H.R. Rep. No. 104-374, 104th Cong., 1st Sess. (1995), *reprinted in* 1996 U.S.C.C.A.N. 1029 (report on the FTDA) ("A federal dilution statute is necessary because famous marks ordinarily are used on a nationwide basis and dilution protection is currently only available on a patch-quilt system of protection . . . ."). In light of these congressional statements, it makes no sense to discourage attempts by trademark owners to assert their rights in pre-litigation cease-and-desist letters.

CONCLUSION

The Tenth Circuit's decision in *Cardtoons*, along with the attendant uncertainty it creates nationwide, are forcing trademark owners into the unwieldy position of having to strike first in court and ask questions later, or remain silent in the face of infringement of their rights. In addition to burdening the courts, this state of affairs inhibits the assertion of rights of intellectual property owners and undermines the important public interests that these rights serve. It does so at a time when the need for trademark protection is at a high, and it hinders the important policies favoring the promotion of judicial economy and the use of alternative dispute resolution processes. These factors make the federal question at issue one of great importance for trademark owners and for the general public alike. For these reasons, INTA respectfully requests that the Court issue a writ of *certiorari* to the Tenth Circuit Court of Appeals to review this case and to clarify this very important area of the law.

Respectfully submitted,

BRUCE P. KELLER
Counsel of Record
AYALA DEUTSCH
Attorneys for the International Trademark Association
1133 Avenue of the Americas
New York, New York 10036
(212) 768-9887